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The Anatomy of Autonomy: An Institutional Account of Variation in Supranational Influence*

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Abstract

This article presents a rational institutionalist account of why the Commission and the ECJ vary in their capacity to pursue successfully a supranational agenda. In the empirical part, the explanatory power of this approach is illustrated through a comparison of the Commission's and the ECJ's autonomy in the pursuit of a joint agenda in EU enforcement. The article suggests that the EU as a strategic context is comparatively more open to autonomous actions and supranational influence by the ECJ, which is subject to less intrusive control mechanisms and enjoys more accessible means of rule creation than the Commission.

I. Introduction

When, where, and how are the European Union's (EU's) supranational institutions able to implement their own agenda? Or rephrased in general terms, what causes institutions to have autonomy, and why are some institutions more autonomous than others? This article addresses these questions

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with a particular focus on the European Commission and the European Court of Justice (ECJ). Whereas traditional approaches to European integration dispute the autonomy of the supranational institutions, they pay less attention to the question of variation between the Commission and the ECJ, and explicit comparative analyses are rare. This article presents a rational institutionalist perspective aimed at explaining why the Commission and the ECJ vary in their capacity to act autonomously in pursuit of supranational goals. In the empirical section, the explanatory power of this approach is illustrated through a controlled comparison of the two institutions' capacity to implement a joint agenda in EU enforcement.

With its aim of explaining variation in autonomy, this article shares the general institutionalist ambition to move the debate beyond the competing claims of neofunctionalism and intergovernmentalism, and to demonstrate the merits of institutional approaches (e.g. Pierson, 1996; Pollack, 1997; Alter, 1998; Armstrong and Bulmer, 1998; Tsebelis and Garrett, forthcoming). Summarizing the well-known arguments, neofunctionalists traditionally contend that the supranational institutions enjoy substantial autonomy from national governments in the exercise of their powers, and function as 'engines of integration', which identify policy problems and mobilize transnational support (e.g. Sandholtz and Zysman, 1989; Burley and Mattli, 1993; Stone Sweet and Sandholtz, 1997), whereas intergovernmentalists maintain that EU governments remain in control, and that the institutions function as 'obedient servants', only fulfilling functions entrusted to them by the Member States (e.g. Garrett, 1992; Moravcsik, 1993, 1998).

Institutional analysis allows us to move beyond this deadlock by offering theoretical instruments capable of explaining variation in supranational autonomy over time, institutions and issue-areas. Privileging the institutional structure of political interaction in the EU, institutional analysis specifies how changes and variations in this structure affect the behaviour of the actors operating under it. Principal–agent (P–A) theory, as developed within rational choice institutionalism, offers a particularly powerful tool. By acknowledging the initial primacy of the Member States (principals) and then investigating their degree of control over the supranational institutions (agents), P–A theory invites conditional generalizations about the institutional circumstances under which we can expect to see supranational autonomy, here defined as the successful pursuit of a private agenda. Next to existing work by rational choice institutionalists (Pollack, 1997, 1998; Alter, 1998; Schmidt, 1998a; Tallberg, 1999, 2000), the explanatory potential of P–A theory is best illustrated by the recourse made to these conceptual tools by intergovernmentalists and neofunctionalists in search of theoretical additions enabling them to address variation (cf. Moravcsik, 1995; Stone Sweet and Caporaso, 1998).

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This article explores and extends the functional logic of the rational institutionalist approach to supranational autonomy. In the next section, I demonstrate how institutional function is an important antecedent factor, conditioning Member States' control mechanisms, the institutions' means of influence, and ultimately their scope for autonomous actions. In simplified terms, an independent court cannot be monitored and sanctioned in the same way as a political bureaucracy, nor can a political bureaucracy initiating new rules employ the same strategies of autonomous action as an independent court interpreting existing rules. This difference has implications for the institutions' capacity to pursue their own supranational agenda, as I then proceed to illustrate in the empirical section on the Commission's and the ECJ's parallel attempts in the 1990s to create effective sanctions against non-complying Member States.

II. Rational Choice Institutionalism and Supranational Autonomy

The institutional account presented here conceives of supranational autonomy as essentially a product of function. It thereby extends the functional logic at the heart of the theory of delegation in rational choice institutionalism. The argument consists of three consecutive steps, where function (1) is the basis of delegation, (2) shapes government principals' control mechanisms, and (3) conditions the supranational agents' means for exercising autonomy. In this section, I first develop this logic in general analytical terms, before specifying its implications in the EU context.

The Functional Basis of Variations in Delegation, Control and Autonomy

It is generally recognized that rational choice institutionalism provides a distinctly functional answer to questions of institutional design and delegation (cf. Keohane, 1984). The delegation of authority from one actor to another is explained by reference to the functions performed by the latter, and the value of these actions for the delegating party. Expressed in P–A terms, a principal delegates functions to an agent in the expectation that the agent will act in ways which produce outcomes desired by the principal. In the political domain, common functions which principals may wish to delegate include monitoring of compliance, solving incomplete contracting problems, independent regulation, and formal agenda-setting (Pollack, 1997).

P–A theory posits that the scope for agent autonomy in such a relationship varies with the control mechanisms operated by the principal. The starting point of this argument is the recognition that relationships of delegation are inherently problematic, because of the simultaneous presence of conflicting interests and information asymmetry. Not only do agents have interests too,

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which they act to attain, but they also tend to know more about their interests and actions than their principals do, granting them an informational advantage. The agent is thus provided with both a motive and an opportunity to act autonomously in pursuit of its own interests, rather than those of the principal. The principal, however, may mitigate this problem by designing control mechanisms – monitoring and sanctions – which reduce the information asymmetry and provide the agent with additional incentives to comply.

Extending the functional logic of rational choice institutionalism, I submit that the initial functions delegated to an agent heavily condition the control mechanisms that principals may employ. Not all agents are delegated the same functions, and when designing control mechanisms, principals must take these diverging tasks into account. Within the domain of political delegation it is evident that supranational bureaucracies, regulatory agencies, courts and central banks cannot be monitored and sanctioned in the same way, since the form of control that might be possible in relation to bureaucracies and agencies in fact would undermine the functions of courts and central banks. This is why bureaucracies commonly are controlled through constraining administrative procedures, intrusive review arrangements, and the threat of budgetary cuts or reorganization, while courts generally are relieved of such direct control mechanisms. Active interference in the work of a court would conflict with its function of independent arbitration and interpretation, as well as undermine the judicial independence on which its legitimacy rests. Without legal legitimacy, a court would be unable to command compliance with the judgments it delivers, and ensure respect for the interpretations it presents. To abstain from intrusive control is therefore, with a different expression, the price that political principals must pay when setting up and delegating powers to a court.

Finally, delegated functions decisively shape the strategies that agents may utilize when pursuing their private interests. This shaping has implications for agent autonomy, since some agents are restricted to means of influence with higher degrees of exposure to Member State control than others. In general terms, we may distinguish between agents who must seek the regular approval of principals in the execution of their actions, and agents who explicitly are provided with an independent mandate beyond principals' reach. In the first case, it may be a question of actions involving re-election, reporting requirements, consent, or time-limited competence, whereas examples of the second kind include enforcement, arbitration, interpretation and central bank decisions. Agents of the first category can only pursue forms of autonomous action that nevertheless will secure principals' approval, for example, concealing true intentions or framing results in ways that appeal to principals. By contrast, agents whose very rationale is to be autonomous from principals' influence,

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may exploit this to advance private interests in the pursuit of their general activity, under the cloak of independence.

Summing up, the rational institutionalist perspective presented here suggests a set of functionally based reasons for why some institutional agents may enjoy a greater capacity than others to pursue successfully their own agenda. In the following two sub-sections, I develop this argument in relation to the Commission and the ECJ, specifying how their divergent functions condition Member States' control mechanisms and the institutions' strategies of influence.[1]

Variation in Member States' Control Mechanisms

This article focuses on the Commission's primary function of initiation and the ECJ's function of interpretation, as these functions signify participation in alternative processes of rule creation.[2] While the Commission participates in the political process of policy-making, whereby new legislation is adopted, the ECJ operates in the judicial process of interpretation, whereby already existing law is further explicated. At the heart of the distinction between initiating new and interpreting existing rules is the question of mobilization. Whereas the Commission must convince EU governments of the appropriateness of the legislation it proposes, the ECJ need not mobilize Member States to introduce new rules through its case law. The requirement of mobilization grants Member States a form of participation-based monitoring with regard to the Commission, while the ECJ is only subject to observation-based monitoring. The term 'participation-based' points to governments' ability to observe and actively intervene in the execution of an action, whereas 'observation-based' signifies the ability to observe an action without the possibility to force a change of outcomes in this process.

The need to secure government approval forces the Commission to seek informal contacts with Member States in the preparation of legislation, which works to reduce the Commission's informational advantage. Member States gain an insight into internal Commission policy formulation and an ability to shape the outcome by signalling their preferences. Moreover, the requirement of consent entails that the Commission must formally present its proposals to the Council for adoption, which both decreases informational asymmetries and offers governments the possibility of sanctioning the Commission by dismiss-

[1] P–A theory employs a conceptualization of actors as unified entities with a given set of preferences. Obviously this is a simplification, which does not recognize the degree of division inside the supranational institutions and Member States. However, as the purpose here is to model strategic interaction between these actors, rather than internal relations within, this assumption is quite helpful.

[2] For P–A assessments of Commission autonomy in its other functions, see Pollack (1998) on policy execution, and Tallberg (1999) on policy enforcement.

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ing its proposals, if it has not been sufficiently attentive to their preferences. Commission initiation at intergovernmental conferences (IGCs) constitutes a special case of extreme participation-based monitoring, partly because unanimity is required for treaty change and the shadow of mobilization therefore looms even larger, partly because Member States hold the primary control of the agenda, which generates a more even distribution of information. By contrast, Member State monitoring of the ECJ is observation-based and in no way indicates direct involvement in its decision-making. Even if member governments may signal their preferences by submitting observations and arguing their cases before the ECJ, they cannot prevent it from handing down a particular judgment.

Turning to Member State sanctions, the functions of initiation and interpretation shape the measures available to EU governments, especially the ease with which they can overturn supranational decisions. It is fundamental in the EU, as in all policy-making systems, that initiated policy can be changed through new legislation, whereas legal interpretation would be of little value if it could easily be altered. The Commission's actions are therefore most susceptible to *ex post* correction, since member governments always enjoy the right to re-legislate. In practical terms, however, this is made more difficult by the Commission's exclusive right of initiative, and the requirement that governments must reach a sufficient level of agreement. In the case of the ECJ, however, only decisions based on secondary legislation (e.g. directives) can be reversed by enacting new legislation. To the extent that Member States want to reverse a ruling based on primary law (e.g. treaty articles), the only option open is a revision of the treaties, requiring unanimous agreement at an IGC and ratification in all Member States. These strict requirements for sanctioning the ECJ grant the institution the possibility of exploiting diverging Member State positions for the purpose of implementing an agenda it knows governments cannot undo or punish.

Variation in the Supranational Institutions' Strategies of Influence

The supranational institutions' participation in alternative processes of rule-creation conditions the means available for advancing a private agenda, with implications for the scope and format of autonomy. Expressed in P–A terms, the Commission, because it must secure government support for its proposals, fits the profile of an agent who has to seek the approval of its principals every time it acts. On the contrary, the ECJ has been equipped with an independent mandate beyond the principals' immediate reach.

By implication, the Commission's chances of advancing its own interests are dependent on its capacity strategically to shape its proposals in ways that will secure approval, even if the subject-matter conflicts with the preferences

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of many Member States. This, obviously, is a prominent constraint, but common techniques include packaging, framing, co-optive justification and camouflage (for related concepts, see, e.g., Ross, 1995; Cram, 1997). Packaging entails that the Commission manipulates the cost/benefit calculations of national governments by linking unpopular measures to popular ones, or by presenting a number of proposals that appeal to different Member States. Framing rests on the exploitation of information asymmetries, and entails the Commission in improving the chances for approval by presenting controversial proposals in ways that make them more acceptable to governments, withholding consequences that are likely to be interpreted as negative. Co-optive justification implies that the Commission, by appealing to principles and beliefs heralded by Member States, justifies decisions or policy proposals in ways that render them more difficult for governments to reject. Variants of this technique include justifying decisions through reference to a European Council conclusion (Peterson, 1995) or to legal decisions and principles handed down by the ECJ (Schmidt, 1998b). Camouflage, finally, is an initiative technique sometimes employed at IGCs, where the Commission lobbies receptive governments to present its proposals as their own, thereby allowing the Commission to avoid the special scepticism often accorded its proposals (interview with Commission official, 26.1.98).

The necessity for the ECJ to remain credible as impartial interpreter of the law means that any attempts to implement an independent agenda must be consistent with maintaining legal legitimacy. For legal legitimacy to remain intact, the reasoning of the ECJ must be consistent with existing doctrine and the methodological requirements of legal deduction. But to the extent that it is, legal legitimacy may even be exploited to advance political goals (Burley and Mattli, 1993). This is why the ECJ, especially when it acts autonomously, goes to great lengths to anchor doctrinal advances in existing jurisprudence, and often couples controversial steps with legitimizing objectives, such as securing individuals' rights. Open judicial activism, by contrast, could be highly detrimental, risking both the day-to-day erosion of respect and court-curbing initiatives from countervailing powers (Rasmussen, 1986).

Summing up, the rational institutionalist perspective developed here suggests an approach to interinstitutional variations in autonomy where function is an important antecedent factor, shaping Member States' recourse to control mechanisms and the supranational institutions' strategies for exercising autonomy. The key elements of this approach are summarized in Table 1. Interpreting political relations in the EU through this lens, we find a strategic context comparatively more open to autonomous actions by the ECJ, which is more sheltered from intrusive government control than the Commission, and enjoys means of influence permitting more independent rule-creation.

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Table 1: The Institutional Basis of Variations in Autonomy

Factors Shaping Autonomy	*European Commission*	*European Court of Justice*
Institutional function	Initiation of new rules, requiring Member State mobilization	Interpretation of existing rules, not requiring mobilization
Member State monitoring	Participation-based monitoring, allowing Member States actively to shape Commission proposals	Observation-based monitoring, relieving the ECJ from direct Member State involvement
Member State sanctions (capacity to overturn supra-national decisions)	Right to relegislate through standard legislative procedures	Right to relegislate when secondary law; treaty revision required when primary law
Institutional strategies for exercising autonomy	Strategies sensitive to the need for securing Member State approval: packaging, framing, co-optive justification and camouflage	Strategies sensitive to the need for maintaining legitimacy: doctrinal anchoring and goal legitimization

The remainder of the article illustrates the logic of this institutional perspective by comparing the scope for supranational autonomy in an empirical case offering good conditions for controlled comparison. The case consists of the Commission's and the ECJ's parallel campaigns in the 1990s to add effective sanctions to their enforcement arsenal. In the post-decisional phase of EU policy-making, the institutions' traditionally pro-integrationist preferences take the shape of securing adequate compliance, since 'more Europe' only can be achieved through the proper implementation of policy programmes. The case demonstrates how the institutions experienced distinctly different opportunities and constraints in pursuing this supranational goal, as predicted by the institutional approach.

III. One Agenda, Two Outcomes: The Supranational Campaigns for Sanctions against Non-Complying Member States[3]

Enforcement is generally taken to mean the existence of both monitoring and sanctions. Prior to 1991, however, the enforcement of Member State compliance in the EU could not be backed up with a general threat of sanctions. The

[3] For a fuller account of these empirical processes, as well as full referencing, see the more comprehensive work on which this section draws (Tallberg, 1999, 2000).

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absence of sanctions in the European Economic Community (EEC) Treaty was the result of an active choice to safeguard national sovereignty, but for the supranational institutions it constituted an omission with severe negative consequences for their capacity to ensure proper compliance with policy programmes. On a number of occasions during the 1970s and 1980s, the institutions had unsuccessfully called on member governments to delegate sanctioning authority. The 1990s witnessed renewed attempts. The intensified efforts were primarily motivated by an upsurge in state non-compliance with EC rules and ECJ judgments in the second half of the 1980s, the inadequacy of existing enforcement means in mitigating these problems, and the approaching 1992 deadline of the internal market programme. The supranational institutions pursued two parallel tracks: on the one hand, the Commission sought to manœuvre EU governments into delegating effective sanctions at the centralized EU level; on the other hand, the ECJ attempted to introduce decentralized sanctions by boosting individuals' opportunities to obtain compensation from non-complying states in national courts.

These supranational campaigns illustrate how Member States' control mechanisms and the institutions' means of influence condition the scope for autonomy, in this case, by allowing the ECJ to introduce measures governments firmly opposed, while blocking the Commission's efforts in the same area. Subject to intrusive participation-based monitoring and the threat of government sanctions, the Commission failed to manœuvre governments into creating effective sanctions, despite the use of autonomy strategies such as co-optive justification and camouflage. The ECJ, by contrast, exploited its power of interpretation and the absence of intrusive monitoring means for the purpose of developing a form of decentralized sanctions unwanted by member governments.

A Futile Quest: The Commission's Bid for Effective Sanctions at the 1991 and 1996–97 IGCs

It was the UK government that in 1991, for the first time ever, put the item of sanctions on an IGC agenda. The UK proposal targeted ECJ judgments, though it was thought that this *ultima ratio* option also would have a deterrent effect on non-compliance in general. The essence of the proposal was a revision of the existing Art. 171, which previously only had been declaratory.[4] Under the UK proposal, the Commission and the ECJ would have the option of imposing financial penalties on a Member State once non-compliance with a first judgment had been established in a second decision, following a repeated Art. 169 infringement proceeding.

[4] In this article, I use the traditional numbering of treaty articles, as this was the one in use during the historical period examined.

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Notwithstanding the institutions' previous calls for sanctions, the Commission's reception of the British proposal was not one of overwhelming enthusiasm. While the UK putting the question of sanctions on the agenda certainly provided a window of opportunity for the Commission, the arrangement proposed was regarded as secondary to alternative sanctioning mechanisms. With the intention of manœuvring governments into accepting more potent sanctioning weapons, the Commission presented a paper at the IGC which evaluated a wide set of possible arrangements, the UK proposal and its own prioritized options included (Commission, 1991).

The document sketched four alternatives. The first possibility, immediately dismissed, was sanctioning provisions such as those in the European Coal and Steel Community (ECSC) Treaty. The dismissal was motivated by the fact that these provisions had never actually been used, and that the form of countermeasures prescribed ran the risk of dismantling the internal market. The second possible arrangement was the British proposal, where the approach was one of careful and constructive criticism. The Commission perceived it as achievable, but stressed political and practical difficulties. The Commission then turned to the two options it preferred. Both involved sanctions through the development of some form of state liability principle. The third sanctioning mechanism was an amplification of Art. 5 of the EEC Treaty, where the Commission specified the requirements for national legal systems stemming from Member States' general duty under EC law. Among the requirements stressed by the Commission were judicial remedies for citizens, financial liability of public authorities toward their victims, and interim measures. The fourth sanctioning arrangement was a suggestion to extend the jurisdiction of the ECJ in cases concerning state non-compliance with treaty obligations. The most favoured extension was to grant the ECJ the power explicitly to declare an offending Member State financially liable toward individuals whose EC rights had been violated. Comparing the alternative of state liability to the British proposal, the Commission found the first to be highly superior: 'A real possibility of having this liability duly established would have a much greater deterrent effect on Member States than the possibility of being ordered to make fixed or periodic penalty payments' (Commission, 1991, p. 133).

Enjoying a privileged position of agenda control and a reasonably even distribution of information, EU governments had little difficulty unveiling the consequences of the Commission's proposals. Article 5 had already been criticized by member governments as being a tool too frequently used by the ECJ to expand the European judicial order. Furthermore, for an intergovernmental treaty to specify the procedural rules of internal legal systems would be to infringe the institutional autonomy of national courts. The proposal to endow the ECJ with the power to declare Member States financially liable

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challenged entrenched government positions on the ECJ's competence. The realization of the proposal would have entailed the introduction of a principle which did not even exist in all national legal systems for violations of national law. EU governments responded defensively, in a declaration attached to the Treaty on European Union (TEU): 'it must be for each Member State to determine how the provisions of Community law can best be enforced in light of its own particular institutions, legal system and other circumstances'. Instead, member governments settled for the less consequential and more sovereignty-friendly alternative presented by the UK. The proposal had been tabled in the early stages of the IGC and the Commission's paper was presented later in the spring of 1991. When the Luxembourg Presidency summed up the negotiations thus far in its draft treaty in June, the British suggestion for amendment was included. There is little to suggest that the question was up for re-evaluation before the conclusion of the TEU at Maastricht in December 1991.

However, as it consists of two full infringement proceedings with the threat of sanctions tagged on at the end, the Art. 171 sanctioning arrangement was likely to be too slow and cumbersome in practical terms. In the 1980s, one single round of the Art. 169 procedure often took four to five years (Audretsch, 1986). The new sanctioning procedure could therefore only provide a remedy in the individual case. Reflecting on the enforcement instruments as upgraded by the revised Art. 171, a centrally placed Commission official concluded: 'It could be argued that the Commission's enforcement powers against Member States ultimately are not all that strong, and it may be something that ought to be looked at in the context of the IGC' (interview, 22.3.1996).

The question of sanctions was first raised in the autumn of 1995 in the Reflection Group preparing the IGC scheduled for 1996. In an verbal presentation, the Belgian member proposed that Art. 171 be removed and its sanctioning provisions inserted into Art. 169 (internal Commission memo, 15.11.1995). The rationale was to simplify and shorten the procedure, by permitting financial penalties to be imposed already after the first judgment and the subsequent establishment that the necessary measures to comply had not been taken. The suggestion received little support among the other representatives, who generally considered it unacceptable (interview with Commission official, 7.1.1998).

The Belgian proposal set the Commission machinery in motion. Again, the Commission sought to manœuvre governments into accepting sanctioning arrangements that most Member States opposed. In late 1995 and 1996, the Commission services weighed the pros and cons of the various ways in which the sanctioning procedure could be shortened. The Legal Service pressed for the option to maintain Art. 171, but remove its administrative phase, so that the

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ECJ could be involved immediately (internal Commission memo, 15.11.1995). Coupled with a campaign by Directorate-General (DG) XV for greater enforcement powers as regards the internal market, this emanated in a suggestion in the Commission's IGC opinion for 'a stronger role for the Court of Justice, particularly as regards compliance with its judgments' (1996a, p. 4). The Commission's calls fell on deaf ears, however, and summarizing the negotiations two months into the IGC, the Presidency flatly concluded that 'it is not thought necessary to amend Article 171 of the TEU' (IGC, 1996a, p. 8).

Rather than taking no for an answer, the Commission reformulated its original proposal and, employing the strategy of camouflage, sought intergovernmental channels for reinstating it on the IGC agenda. First Italy and then Spain proved receptive to the Commission's ideas, and agreed to present its proposal as their own. In early May 1997, the Italian government submitted a proposal that was, as one Commission official modestly expressed it, 'Commission inspired' (IGC, 1997a; interview, 3.2.1998). Save for two modifications, the proposal was identical to a document prepared by DG XV in April (internal Commission memo, 3.4.1997). Softening slightly the Commission's more aggressive suggestions, the Italian government proposed that the institution be granted the competence to adjudicate compliance cases in the internal market domain, and that the administrative stage of the sanctioning procedure be eliminated. But not even when disguised as government initiatives did these suggestions appeal to the majority of the Member States. They did, however, inspire a slightly revised Spanish version, presented in early June. Again, the other governments were dismissive (internal Commission memo, 9.6.1997). When the IGC came to a close in Amsterdam in mid-June, the Treaty agreed upon contained no new provisions strengthening the enforcement weapons of the supranational institutions.

The conclusions of the IGC left hope for the future, however. At Amsterdam, the Commission had managed to get a 'hook' into the Council conclusions, which opened the door to future supranational proposals in this area: 'The European Council requests the Commission to examine ways and means of guaranteeing in an effective manner the free movement of goods' (European Council, 1997, pp. 11–12). This hook enabled the Commission to use the strategy of co-optive justification, by permitting it to revise its proposal and present it anew to governments. In November 1997, the Commission tabled a proposal for a Council regulation which would endow the Commission with special powers in cases involving serious obstacles to the free movement of goods, including rapid resort to the ECJ through an accelerated Art. 169 procedure. Though still an appeal for more substantive enforcement powers, the proposal was a shadow of its former self, drafted on the philosophy that 'a limited proposal is more likely to be accepted by the Member States' (inter-

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view, Commission official, 3.2.1998). The draft regulation was still not uncontroversial, however. In fact, almost all governments opposed the proposal as it stood. If the Commission wanted anything to come out of its efforts, it would have to agree to a further dilution.

The late spring of 1998 witnessed the welding of a compromise, and in May member governments reached a unanimous political agreement. The solution entailed a significant weakening of the Commission's November proposal. Instead of special powers, the Commission would only be granted the right to notify states of the existence of barriers to the free movement of goods, and in a non-legally binding resolution, Member States confirmed their commitment to this fundamental principle. Through consecutive steps of adaptation to the preferences of EU governments, the Commission proposal, envisaging a significant upgrading of Arts. 169 and 171, had been watered down to an unrecognizable regulation, laying down an impotent intervention mechanism.

Mission Possible: The ECJ's Creation of Sanctions Through the State Liability Principle

Parallel to the Commission's pursuit of effective sanctions in the political arena, the ECJ independently took steps in the judicial arena to introduce a form of decentralized sanctions. These efforts formed part of a general ECJ campaign aimed at strengthening national courts as enforcers of EC law. In a string of ground-breaking decisions, the ECJ laid down principles and requirements for the remedies and procedures that citizens and companies should have access to in national courts, when wishing to safeguard rights granted by EC rules. The culmination was the 1991 judgment in *Francovich*, where a completely new damages remedy was created – state liability – granting individuals the right to financial compensation from non-complying Member States.

Before this principle was introduced, national courts could only under very limited circumstances award damages to individuals who had suffered from state non-compliance. By introducing a new, general principle of state liability, the ECJ circumvented the weaknesses of existing remedies, improved individuals' possibilities of obtaining compensation when their rights have been infringed, and *de facto* created new, decentralized sanctions against non-complying Member States.

In *Francovich*, the ECJ determined that an individual can claim compensation from a state that has failed to implement EU directives, given that the directive confers rights on individuals, the contents of those rights are apparent from the directive, and there is a causal link between the state's failure to implement the directive and the loss suffered. Relying on purposive and

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teleological reasoning, the ECJ argued that the full effectiveness of Community law would be called into question and the protection of individuals' rights weakened, if compensation could not be obtained when Member States had breached Community law. The ECJ concluded by stating that 'it follows that the principle whereby a State must be liable for loss and damage caused to individuals as a result of breaches of Community law for which the State can be held responsible is inherent in the system of the Treaty' (para. 33).

But, 'combining terseness of expression with expansiveness of principle' (Ross, 1993, p. 58), *Francovich* raised as many questions as it closed. Did state liability apply to all kinds of Community acts, to all kinds of breaches, and to breaches by all branches of government? In 1996, these questions were answered in a long line of cases, which elucidated and specified the principle. In the linked cases, *Brasserie du Pêcheur* and *Factortame III*, the ECJ expanded the principle when establishing that it applies to *all* breaches of *all* Community law, regardless of whether they result from the legislative, executive or judicial branches of government, and regardless of whether or not the Community provisions have direct effect.

In the remaining three formative cases, the ECJ addressed the definition of a 'sufficiently serious' breach of Community law, which was a requirement for state liability to arise. In *British Telecommunications*, the ECJ held that a breach was not sufficiently serious if a directive was imprecisely worded and capable of bearing the meaning given to it by a government acting in good faith. In *Hedley Lomas*, the ECJ strengthened the principle by stating that the mere infringement of Community law could be enough to establish a sufficiently serious breach, given that the Member State enjoyed little or no discretion. Finally, in *Dillenkofer*, the ECJ clearly stated that all instances where Member States have not implemented a directive in time constitute *per se* serious breaches of Community law.

All existing evidence firmly indicates that the ECJ exploited its privileged position of interpretation to introduce a means of enforcement that collided head on with government preferences. The judgment in *Francovich* was delivered on 19 November 1991, just a few weeks before the closing of an IGC (which culminated in the TEU) at a time when it was clear that member governments at that very conference had discarded the alternative of introducing state liability sanctions, and instead had chosen to revise Art. 171. Not surprisingly, the decision provoked loud cries about judge-made law and judicial activism.

EU governments had expressed their positions on state liability directly to the ECJ before the passing of the judgment. Besides the Italian government, the defendant, three other governments submitted observations in the *Francovich* case. The UK stated that there was no basis in Community law for the

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proposition that an individual has the right to compensation from a Member State that has failed to fulfil its obligations. On the contrary, the ECJ's case law showed that the Treaty was *not* intended to create new remedies in national courts. The Dutch government submitted that there was no Community law on the question of state liability, and that consequently, possible liability could only be determined on the basis of national liability rules. In addition, the Dutch government stressed that it was for national legal systems to lay down the applicable substantive and procedural rules. The German government, finally, contended that the liability of Member States did not fall within the competence of the Community.

When the question of state liability returned in 1996 with the *Brasserie du Pêcheur* and *Factortame III* cases, there were still governments insisting that state liability was a question of national law and that no basis for such a principle could be found in the Treaty. This time, the governments actively opposed to the principle – the German, Irish and Dutch – also made a point of firmly emphasizing that the 1991 IGC had decided not to lay down any general rules governing state liability and instead had chosen to revise Art. 171. In its extremely forceful observation, the German government even went as far as to openly accuse the ECJ of judicial activism and of violating the institutional balance in the EU, when stating that 'an extension of Community law by judge-made law going beyond the bounds of the legitimate closure of lacunæ would be incompatible with the division of competence between the Community institutions and the Member States laid down by the Treaty' (para. 32).

Unable to prevent the ECJ from introducing and developing the principle of state liability, Member States explored possible ways of limiting the implications *ex post*. They came to pursue two forms of sanctions. First, at the 1996–97 IGC, a group of governments led by the UK openly proposed a revision of the ECJ's competences, including measures that were directed at reducing the effects of *Francovich*. Second, some national governments and courts have been hesitant in their reception of the state liability principle.

The IGC scheduled for 1996 provided an opportunity for governments uncomfortable with the ECJ's independent expansion of Community law to voice this discontent. In September 1995, the UK representative to the Reflection Group circulated a paper that expressed concern about how certain ECJ judgments, *Francovich* in particular, 'have led to significant unforeseen consequences, have been disproportionate in their effect, and have created severe practical problems' (Davis, 1995, p. 1). To correct this situation, and more generally sanction the ECJ, the UK proposed that the IGC should limit Member State liability for breaches of EC law, limit the retrospective effect of judgments, extend governments' capacity to apply national time limits, create an ECJ appeals procedure, facilitate rapid amendment of Community legisla-

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tion where the Council believes that the ECJ has interpreted a provision 'incorrectly', and introduce an accelerated procedure for time-sensitive cases.

A majority of the members in the Reflection Group were not prepared to back the UK. But, whereas the small states, and Belgium in particular, remained faithful to the ECJ, the French and German representatives indicated a certain level of approval for the British proposals (internal Commission memo, 27.10.1995). Notwithstanding this setback, the UK persisted in its campaign against the ECJ, and presented its suggestions anew when the IGC opened (IGC, 1996b). Again, the main emphasis was on the 'risk of excessively large and unpredictable financial liabilities' (internal Commission memo, 27.10.1995, p. 4), but also this time the UK failed to gather sufficient support.

Some governments were, however, sympathetic to the idea that the ECJ should be sent a warning. While most of time hiding behind the more extreme British position, the German and French governments came out in the open as it became increasingly clear that the UK proposals would be dismissed by the IGC. In October 1996, Germany presented a suggestion that collided head-on with the declared position of the ECJ, when arguing for the splitting of its competence with respect to preliminary references from national courts, and the transfer of certain domains to the Court of First Instance (IGC, 1996c). In March 1997, the French government tabled a proposal with modified versions of the British proposals concerning retrospective effect, amendment of Community law and national time limits (IGC, 1997b). One Commission official monitoring the negotiations goes as far as to denote all these proposals 'blatant attempts by certain Member States to weaken the Court' (Interview, 7.1.98). In the end, however, none of the proposals gathered anything close to the support of all Member States, and none found its way into the Amsterdam Treaty, which illustrates the difficulties involved in sanctioning supranational agents through treaty revision.

Next to the sanction of treaty revision, inaction at the national level functioned as a form of sanction against the ECJ's 'creative interpretation'. In their capacity as Community courts, national courts are charged with the duty to apply EC law, and national governments must enable and allow domestic courts to fulfil this function. When the ECJ introduced the principle of state liability, Member States were obliged to ensure that individuals actually could rely on this remedy.

If the substantive and procedural conditions for state liability laid down in national law were sufficient to satisfy the ECJ's standards, these were to be relied on. If not, national legal systems would have to be adjusted; either through governments legislating to the effect that appropriate remedies were created, or through courts recognizing a new cause of action or adjusting existing remedies. For most national legal systems, *Francovich* and the

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ensuing string of cases introduced something that was partially or completely new. Yet, by 1997, no Member State had taken legislative steps to accommodate the development in Community law (SOU, 1997). Instead, national governments had accepted the often less-than-optimal fit resulting from the existing order or the modifications to existing procedures that national courts might have undertaken.

Patterns in the cases handled by national courts are an indirect indication of the extent to which citizens and companies have been able to rely on the principle of state liability. Available data, collected by the International Federation for European Law (FIDE) and the Commission, suggest that the concrete implications of the principle so far may have been more restricted than often predicted (FIDE, 1998; Commission, 1997, 1998). As regards cases brought before courts based on incorrect or no transposition of directives, most Member States had seen only a few cases by early 1998, though we should bear in mind that early cases may function as precedents allowing later claimants compensation without court decisions. Of the cases that have been decided by national courts, the emerging picture is one of hesitancy. In relatively few cases have the claimants been awarded compensation; more often, their claims have been dismissed on procedural or substantive grounds. More exceptional cases of national court recalcitrance are the instances where higher courts have dismissed liability claims by refuting the supremacy of EC law over national law. In sum, whereas it is likely that this doctrinal development will gain in acceptance over time, and follow the pattern of the principles of direct effect and EC law supremacy, it appears as if some national courts and governments have been hesitant in their reception of the ECJ's state liability case law, thereby, at least temporarily, reducing some of its impact.

Explaining Variation: Institutional Function, Member State Control and Supranational Strategy

The comparison between the supranational institutions' parallel campaigns for effective sanctions illustrates the principal analytical points of the rational institutionalist perspective on autonomy. In both cases, the capacity of the institution to pursue its private agenda was heavily conditioned by its functional mandate, which shaped the control mechanisms available to EU governments and the institution's means for exercising autonomy.

The Commission's attempts to manœuvre governments into creating effective sanctions demonstrates its limited capacity to act autonomously within its function of initiative, especially at moments of treaty revision. In control of the agenda, national governments enjoyed an extreme form of participation-based monitoring, which balanced the distribution of information about the conse-

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quences of supranational proposals. Despite the use of strategic techniques, such as using European Council conclusions as springboards for new proposals and camouflaging proposals as governmental, the Commission did not succeed in manœuvring EU governments into accepting its proposals. The requirement of mobilization not only granted national governments a form of close monitoring, but also the sanction of a veto, to the extent that the Commission did not adjust its proposals to their preferences. By consequence, the institution's suggestions at the 1991 IGC were dismissed in favour of revising Art. 171, whereas the 1996–97 IGC was a rearguard battle for the Commission, which was forced to adapt its proposal for an effective sanctioning procedure to governments' preferences in a number of consecutive steps.

The case of state liability illustrates how the ECJ exploited its judicial independence and power of interpretation to develop a form of decentralized sanction unwanted by member governments. With only observation-based monitoring at hand, EU governments sought in vain to influence the ECJ by signalling their preferences in case observations. With no means of intrusive monitoring, national governments were unable to prevent the ECJ from establishing the principle. Anxious to preserve judicial legitimacy and uphold respect for its interpretation, the ECJ contended that the principle was inherent in the Treaty, and linked the creation of decentralized sanctions to the protection of individuals' EC rights. These steps proved insufficient to fend off criticism, however, and with mixed success, Member States took to *ex post* sanctions against perceived judicial activism. The ECJ managed to avoid the most threatening sanction, exploiting division among governments and the high institutional barriers involved in treaty revision. Recalcitrance at the national level functioned as an additional form of sanction, however, temporarily reducing the implications of the ECJ's actions in some Member States.

The merits of P–A theory in explaining the divergent outcomes in these processes stand out when compared to the predictions of rival theoretical accounts. While neofunctionalism correctly would have predicted the ECJ's use of its position for purposes of furthering legal integration, it cannot explain why the Commission could not exploit the 1991 opening in the political opportunity structure to engineer support for its preferred sanctioning alternative, nor why the implications of the ECJ's activism have been restricted through hesitancy among its traditional allies, the national courts. Intergovernmentalism would have been better equipped to predict the Commission's impotence, but experiences serious difficulties explaining why Member States allowed the ECJ to develop a form of sanction they explicitly had discarded at the 1991 IGC and later attempted to punish or undo. Clearly, this was not a case of Member States condoning a judicially engineered improvement of enforce-

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ment for purposes of strengthening their mutual commitments (cf. Moravcsik, 1998).

IV. Conclusion

Institutional theory offers theoretical instruments capable of explaining variation in supranational autonomy, thus allowing us to move beyond the competing claims of neofunctionalism and intergovernmentalism. This article has developed the rational institutionalist perspective on autonomy, by exploring the functional basis behind the supranational institutions' capacity successfully to pursue their own agenda. Anchored in P–A theory, the article suggests that institutional function is a important antecedent factor, which conditions Member States' control mechanisms, the institutions' means of influence, and ultimately their scope for autonomous actions. The ECJ's function as supreme interpreter of EC law relieves the institution from intrusive control mechanisms and provides it with means of independent rule creation, making it comparatively easier for it to act autonomously. Equipped with the political mandate to act as the spearhead of integration, the Commission, by contrast, must mobilize Member States to implement its own agenda, and is subject to an elaborate system of control mechanisms.

Rational institutionalist analysis holds the promise of being an area of extensive and fruitful activity in coming years. Not only may the existing understanding of such themes as supranational autonomy be further refined through a more detailed specification of the institutional basis of this phenomenon, but the evolution of European governance continuously opens up new areas of applicability. One of the most intriguing developments, begging further exploration, is the growing tendency to delegate extensive powers to institutions other than the traditional supranational ones, most notably regulatory agencies and the European Central Bank (ECB). An EU where delegation is ubiquitous offers a standing invitation for institutional analysis to explain where, why, and how power is delegated and autonomy is exercised in the pursuit of political objectives.

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